

IN THE COURT OF THE ADDL. SESSIONS JUDGE: BHUBANESWAR.

PRESENT:-

Sri I.K. Das LLB,
Addl. Sessions Judge, Bhubaneswar.

Crl. Appeal No. 1/9 of 2012-10

(Arising out of judgment dtd. 30.1.2010 in 1CC case No. 586 of 2000 passed by
learned Judicial Magistrate First Class (O), Bhubaneswar)

Surya Narayan Mohapatra, aged about 46 years
S/o: Sarada Prasad Mohapatra, resident of Vill: Dahaliabag
PO: Bhanpur, PS: Cuttack Sadar, Dist: Cuttack

... Appellant

Vrs.

1. State of Orissa

2. Ashutosh Pattnaik, aged about 35 years
S/o: Jagadish Pattnaik, Proprietor of
M/s Urmila Distributors, At/PO: Tomando
PS: Khandagiri, Dist: Khurda

... Respondents.

Advocate for the appellant:- Sri M.B. Das & Associates
Advocate for the Respondents- Sri B. Hota & Associates

Date of argument- Dt.01.02.14

Date of judgment- Dt.14.02.14

JUDGMENT

This appeal is directed against the judgment of conviction and sentence convicting the accused to undergo simple imprisonment for a period of two years for the offence u/s 138 of NI Act and to pay compensation of Rs.7,50,000/- to the complainant as per the provision laid down under Sec. 357 Cr.P.C passed by learned Judicial Magistrate First Class (O), Bhubaneswar vide her judgment dtd. 30.1.2010 in 1CC case No.586 of 2000.

2. Before entering into the ground of appeal, let me place the case of the complainant (respondent in the appeal) in the lower Court in nutshell. The

complainant was dealing with the distributorship of a firm under the name and style of M/s Urmila Distributors located at Tomando PS: Khandagiri, Dist: Khurda. He was dealing with detergents, cement and fertilizer of different companies. The appellant-accused in the trial Court was also dealing with the business in the name and style M/s B.M. Brothers and Urmila Fertilizers. As both the complainant and accused were relation, they were having business transaction between their firms. The accused was collecting materials from the firm of the complainant on credit for his business purpose and in order to repay the credit amount he issued a cheque bearing No. NCC8141073 dtd. 20.5.2000 of Canara Bank, Badambari Branch, Cuttack amounting to Rs.3, 91, 636/-. The complainant on receipt of the cheque presented the same with the Union Bank of India at Aiginia on 20.5.2000 for collection. But, the cheque bounced due to insufficient of funds in the account of the accused firm. The matter having been intimated to the accused, he requested the complainant to present the cheque after Raja festival i.e. after one month for collection of the amount. As per the advice of the accused, the complainant again presented the said cheque at Puri Gramya Bank, Tomando, but this time also the cheque returned due to insufficient funds. Such bouncing of cheque in the bank of the complainant came to his knowledge on 8.11.2000 when he received letter with cheque return memo. The complainant again tried to contact with the accused, but as he failed to contact him he issued a pleader notice to him on 10.11.2000 demanding the cheque amount alongwith the commission charge within 15 days, but the notice also returned without service. The pleader of the complainant got back the pleader notice on 23.11.2000 and thereafter, the complaint was filed in the Court of learned SDJM, Bhubaneswar on dtd. 4.12.2000.

3. The accused after entering appearance contested the case by cross examining the witnesses of the complainant and also by adducing evidence in the Court. It is the case of the defence that he was highly educated and unemployed. The complainant being his relation requested him to help in his business and therefore, he joined in the firm of the complainant and was managing his business under M/s Urmila Fertilizers. The complainant himself is the proprietor of the

said firm and the accused was working with the assurance to get 10% of monthly profit of the firm. As per the instruction of the complainant, he also opened a bank account and he was issuing cheque as per the direction of the proprietor-the complainant himself. It is also the case of the defence, that the complainant was also keeping some blank signed cheque of the accused for the purpose of the business. Due to dispute between of them, the accused also left the firm of the complainant, but the blank signed cheques which were in possession of the accused have been misused and the case has been filed by taking advantage of such signed cheques and by interpolating the documents for the purpose of the case. As regards the issue of pleader notice, it is the defence case that although the accused was residing in his house and at no point of time, he was informed about the case either by the complainant or by the postal peon. The complainant with ulterior motive has been able to obtain the endorsement of postal peon that he was remaining absent and was avoiding to receive the pleader notice.

4. Learned counsel for the appellant while filing the appeal, has pressed that the learned trial Court has misdirected the judgment and failed to appreciate the evidence on record. This being a criminal case, the basic principle of criminal jurisprudence that prosecution is to prove its case beyond reasonable doubt has not been adopted. On the other hand, learned trial Court made liable to the respondent to disprove the case of the complainant which is unknown to criminal law. The pleader notice issued against the respondent should not have been accepted as sufficient in absence of supporting evidence as mandated by the principle of law. The documents relied by the complainant have been scored through at different places by changing the date to fit the case which has not been considered in its proper prospective by the learned lower Court. On the basis of such ground, it has been urged that the appellate Court should consider the evidence on record afresh to pass a judgment.

5. The complainant examined himself as P.W.1 and also examined the Branch Manager, Puri Gramya Bank as P.W.2. On the other hand, the accused examined himself as D.W.1. In addition to the oral evidence, the complainant relied on the disputed cheque, cheque return intimation of Canara Bank to Puri

Gramya Bank and cheque return memo of Puri Gramya Bank to the complainant, pleader notice alongwith its postal cover, despatch register of the bank marked as Ext.1 to 6 respectively.

On the other hand, accused has filed the letter of public information officer, copy of registration certificate showing that the complainant is the proprietor of the firm namely, M/s Urmila Fertilizer. Xerox copy of one way bill dtd. 29.7.98 has also been relied by the accused which has been marked as Mark Y.

6. The cheque issued by the accused itself shows that the cheque was issued on behalf of Urmila Fertilizers in favour of Urmila Distributors. While the complainant adduced evidence that the accused is the proprietor of Urmila Fertilizer, it is the case of the defence that the accused was working under the proprietorship of the complainant as an employee on commission basis. No doubt the complainant during his cross examination was forced to admit that he was the proprietor of Urmila Fertilizers independent to the firm Urmila Fertilizers of the accused. Ext.A/1 is the information of the public Information Officer, District Agricultural Officer, Khurda intimating that the complainant is the proprietor of Urmila Fertilizers situated at Tomando. The Registration certificate marked Ext.A/2 sufficiently establishes that the firm Urmila Fertilizer is registered in the year 1997 which was valid upto 29.2.2000. The cheque was issued by the accused on behalf of Urmila Fertilizer on dtd. 20.5.2000 and it remained in doubt if the firm was in existence on the date of issue of cheque by further renewal of the firm. In his cross examination, the accused said that he was managing the firm from the year 1998 to November, 1999 on commission basis and thereafter, he left the complainant having no business relation with him. The accused in his cross examination has said that the complainant had opened another outlet of his shop under the same banner "Urmila Fertilizer" at Pira Bazar, Bhanpur, Cuttack and he was looking after the said outlet. But, the complainant was the proprietor of both the establishment wherein he was working as an employee only. Taking into consideration the oral evidence of both the complainant and accused alongwith Ext.A series, it can safely be said that not the accused but the complainant was the

proprietor of the firm namely, Urmila Fertilizer and the complainant has failed to show if the accused was having any other firm in the same name and style by producing any substantial evidence in the Court. Urmila Distributor is another firm belonging to the complainant situated at Tamando. Under Sec. 141 of Negotiable Instruments Act, if a person committing an offence u/s 138 of NI Act is a company or a firm, every person who at the time of offence was in charge of and was responsible to the company for the conduct of the business shall be deemed to be guilty of the offence and shall be liable to be punished accordingly. Therefore, in the instant case, the complainant is also liable u/s 138 NI Act in accordance with provision of Sec. 141 of the Act as he himself is the proprietor of the firm who issued the cheque.

7. It is urged that that Sec. 138 NI Act is only applicable when cheque is issued in respect of legally recoverable debt. Although the trial, the complainant only claimed that the accused took different articles amounting to Rs. 3,91,636/- and did not pay the arrear amount. But, nowhere he said which articles were supplied to him and not a scrap of paper has been filed to that effect although, such huge amount was pending against the accused. When the accused takes the plea that the complainant was misusing the blank signed cheque it will not give presumption u/s 139 of NI Act that implied authority is given to holder of cheque to fill it up towards discharge of debt. Defence relied on a decision reported in **1 (2009) CCR 100 (SC) in the case of Kumar Exports vrs. Sharma Carpets and 2008 Cri. LJ 1172 Supreme Court in the case of Krishna Janardhan Bhat vrs. Dattatraya G. Hegde**. The complainant has not filed a single piece of paper to show that the accused purchased articles from his firm on credit to the tune of the cheque amount and on the other hand, the accused has shown that the complainant is himself the proprietor of Urmila Fertilizer. Therefore, it is hard to believe that the accused was liable to pay any debt to the complainant as he was no way connected with the firm.

8. It is further argued that Exts.1,2 and 3 have been manipulated by the complainant for the purpose of the case. As it appears from the pleader notice (Ext.4) that the complainant deposited the cheque in the month of September, 2000

in Puri Gramya Bank at Tomando Branch. But, on perusal of Ext.2, it appears that the cheque having been deposited at Puri Gramya Bank was forwarded to Canara Bank and the said bank intimated Puri Gramya Bank on 29.7.2000 that the firm had no sufficient fund to honour the cheque. Therefore, it appears that the cheque was presented at Puri Gramya Bank much prior to 29.7.2000 and not in the month of September as stated in the pleader notice. Ext.3 again creates doubt. After obtaining intimation from Canara Bank, Puri Gramya Bank prepared cheque return memo and the original date as given on Ext.3 was in the month of August. The date given on Ext.3 has been scored through at both the places and a new date i.e. 2.11.2000 has been written which are marked as Ext.A and A/1 from the side of defence. It is submitted that it is impossible that Puri Gramya Bank did not intimate the complainant about bouncing of cheque and kept silent for about 4 months. Rather it may be probable that the dates have been scored through by the complainant to create a cause of action to fit the case. The bank manager has been examined as P.W.2 and deposed evidence in reference to the bank register marked as Ext.6. In his cross examination he said that whenever any writing or document is corrected by overwriting, it carries the initial of the officer, but in the instant case, although both the dates have been corrected no initial is available on the cheque return memo. He said that by the time of such transaction, one N.C. Behera was the Manager of the bank who can explain about such cuttings in the documents. Learned trial Court came to the conclusion that it was the duty of the accused to examine Sri Behera in order to establish that the cuttings were made at the instance of the complainant. It is the cardinal principle of criminal jurisprudence that the prosecution is to prove its case beyond reasonable doubt and cannot stand on the shoulder of the defence. When defence creates a genuine doubt regarding the prosecution case, its liability is discharged. It is not the duty of the accused to disprove the case of the prosecution rather prosecution is at the onus to prove its case. The approach of the learned trial Court by fixing the liability on the accused is not proper. The conduct of the complainant by suppressing the fact that he is the proprietor of Urmila Fertilizer and creating different stories at different stage of the case makes the case more ambiguous.

The complainant should have taken steps to examine the Bank Officer who scored through the dates on Ext.3 and who withheld the intimation for about 4 months regarding dishonour of cheque in order to show that he approached the Court in clean hand. As per the provision of the Act u/s 138 (b) of NI Act, pleader notice is to be issued within 15 days of the receipt of information about the dishonour of cheque from the bank. On 10.11.2000, pleader notice was issued to the accused. If the original date given on Ext.3 is taken into account, then it was intimated to the complainant in the month of August. Accordingly, the pleader notice issued by him is barred under the Act. I have also perused the bank register (Ext.6). Ext.6/1 is the entry dtd. 3.11.2000 in favour of Urmila Distributor in reference to a letter No. 210/2000. There is no mention in the register regarding any enclosure alongwith the letter. Moreover, letter No. 210/2000 as reflected in the register does not find place on Ext.3 which was issued to the complainant. It is more surprising that the entry in the bank register showing despatch of the letter to the complainant are only for the month of November and December, 2000 without any entry of the previous months. I have considered the case from other angles also. As per the complaint petition, the cheque was dishonoured for the first time in the month of May and on the request of the accused to present it again after Raja Festival, i.e. after one month, the cheque was presented in the bank. Usually, Raja Festival is observed during the month of June every year. Therefore, the cheque was presented in the bank in the month of July, as evident from the date given on Ext.2. Thereafter, on receipt of information from Canara Bank, Puri Gramya Bank prepared the cheque return memo in the month of August and it was issued to the complainant in the same month which is transparent from the original dates given on the document which has been scored through by manipulation. Presentation of cheque in the month of September as per the pleader notice and receipt of information with cheque return memo from the bank in the month of November appears to be creations of the complainant for the purpose of the case. Thus, the documents relied by the complainant creates doubt at every stage which has not been explained in any manner.

9. As regards notice to the accused, learned counsel for the respondent

argued that although notice was issued to the accused intentionally he remained absent in the given address and the letter returned back with endorsement of the postal peon that addressee always absent. The postal cover Ext.5 shows someone interpolated and wrote down “refused” which is not the endorsement of postal authorities. It has been argued from the side of respondent that once notice is issued in the correct address of the appellant, it will be presumed that notice has been served on him. By interpreting the provisions of General Clauses Act, learned counsel argued that although the appellant did not receive the notice it will be treated as sufficient against him. On the other hand, learned counsel for the appellant argued that simply issuance of notice in the correct address will not suffice the purpose of the complainant in absence of supporting evidence. In support of his contention, he relied on a number of decision of Hon'ble Apex Court and different High Courts. He relied on a decision reported in **2004 (3) Crimes 505 in the case of Auto Supplies vrs. B. Rajendran, 2007 CrL LJ 1313 in the case of Ramesh Chand vrs. Ravinder Singh Chandel**. The accused in his evidence consistently stated that all along he was residing in his village and at no point of time, the post peon handed over the letter to him or atleast intimated about such notice. The evidence of the complainant is silent regarding presence of the accused or avoiding to receive the notice. The postal peon has also not been examined in the Court to support his endorsement on the postal cover. On the other hand, the endorsement of the postal cover has been interpolated by some other by a writing “refused”. Thus, the case appears to be doubtful since initiation of the case and the complainant has not approached the Court with a clean hand.

10. After hearing both the sides and perusing the evidence on record, I find the evidence adduced by the complainant is doubtful in all respect and the documents relied by him are also not trustworthy which do not stand full proof. Accordingly, it can safely be concluded that the complainant has not been successful to prove its case beyond reasonable doubt and therefore, the judgment passed by the learned trial Court is not acceptable on the face of the evidence on record and conduct of the complainant.

11. In the result, the appeal is allowed on contest. The judgment of conviction

u/s 138 of NI Act and sentence passed thereunder by the lower Court against the appellant is set aside.

Pronounced in the open Court today this the 14th day of February, 2014.

Dictated and Corrected by me.

Addl. Sessions Judge, Bhubaneswar

Addl. Sessions Judge, Bhubaneswar